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A CRITICAL ANALYSIS OF THE NATURE AND SIGNIFICANCE OF CORPORATE MERGERS

By

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For

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PREFACE

The subject of mergers first became of interest to me in July of 1954 when, as part of an assignment at Northeastern University, a paper on the topic was required. The Preface of that work stated that it was hoped further study could justify more valid assumptions.

An opportunity for such study was soon available when the subject was considered for thesis work in partial satisfaction of a Master of Business Administration Degree at Northeastern University. However, the scope was determined to be of unmanageable length for such a purpose, and additional time was necessary if the study was to be accomplished. The completion of the project was assured when the extent of the undertaking was recognized at George Washington University. The required time was granted by allowing the thesis to be submitted in two parts to cover two term papers necessary in partial satisfaction of a Master of Public Administration Degree at that university.

In addition to the problem of time, the study could not have been undertaken had it not been for the inspirational leadership of Dr. Vincent P. Wright, Director of the Graduate School at Northeastern University and Dr. A. Rex Johnson, Director of the Navy Graduate Comptrollership Program at George Washington University. I am deeply indebted to these men for their help and understanding. A special note of gratitude is due Dr. Richard Norman Owens of George Washington University who gave gener-

ously of his time and criticism. In addition, personnel in the Federal Trade Commission and the Department of Justice have been most cooperative and offered many suggestions along with technical advice.

In making investigations for the original paper it was found that considerable writings had been accomplished on the various segments of the subject. Economic books offered a wealth of information on monopoly and competition. Law journals, U. S. Statutes, and books on government regulation of business, fully covered the law. Many writers had attacked the problem of concentration of industry as a result of mergers, and business periodicals had a considerable number of articles on the reasons for the present wave of mergers. In no place, however, was any current writings found covering the full subject of mergers, per se.

It was difficult to understand such a lack of coverage on so important an aspect of business. From a student's point of view such writings were eagerly sought for a full but easy understanding of the basic concepts of the subject. As a result of this fruitless search the form of the thesis took shape. Considerable space is devoted to the early history of mergers while the law of mergers is developed from its inception. This coverage was deemed necessary to bring into focus conditions that may have set the stage for the present merger movement.

A large portion of the material represents information from secondary sources and liberal use is made of footnotes. Considerable insight has been gained, however, from personal interviews with senior corporate officials from forty of the two

hundred largest industrial firms in the United States. These officials were most generous in answering questions; however, misunderstandings may have resulted from the interviews. If so, any errors of interpretation are entirely my responsibility and, therefore, no authority is given for any quotations from this study where such interviews are discussed.

It is hoped, that by the form of presentation and the inclusion of current information gained from industry and governmental agencies, the work will contribute to an understanding of the nature, extent, and future implications of the present merger movement.

E. R. Kingman

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PART ONE

INTRODUCTION

"Mergers of major companies are the more important business events of any period." Commercial and Financial Chronicle, March 26, 1953.

Nineteen hundred and fifty four can go down in history as a year of decision relative to the future of big business vs. the United States Goverment. Not that any such momentous decision was made, only that it was a year when scarcely a day passed that the subject of big business did not make the headlines. The Federal Trade Commission was making investigations, the economists were preaching pure competition, and the leading business publications were carrying article upon article having to do with mergers.

It is unlikely that 1955 will bring forth any new solutions or radical departure from the old. The hue and the cry is expected to go on unabated.

The Problem

The basic problem is one of definition. What do we want from our economy and what do we expect of it in the future? Mary Jean Bowman and George Bach aptly state:

> Most Americans apparently still believe strongly in capitalism and the virtues of a free private-enterprise economy, yet the scope of government action beyond the regulatory duties prescribed by laissez-faire advocates has grown steadily and rapidly. How far should it go, what are the social objectives and what do we want the private-enterprise system to achieve?[1]

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[1] Mary Jean Bowman and George Leland Bach, Economic Analysis and Public Policy, (New York: Prentice-Hall, 1949), p. 579.

It appears that the extent of effort by the government to prevent mergers, and to control business if continued or if successful, would in itself destroy our competitive market and possibly establish a monopolistic economy. On the other hand, if concentration in industry came down to only a handful of the fittest, would monopoly result, and if so would it destroy the economy of the nation as we know it? How should our efforts be expended to preserve the unprecedented growth this nation has experienced and at the same time control this undefined phenomenon known as "big business," if in fact it should be controlled?

Not only is it almost impossible to define the problem but even the segments of the problem become embroiled in controversy. What is competition? What is free-enterprise? What constitutes good mergers or bad mergers? When might a monopoly be good for the public? These are just a small portion of the questions left unanswered. Professor M. A. Adelman, one of the most prolific writers in the field, says of this:

> The most obvious conclusion is also the most depressing one: how little we know of our industrial structure and its evolution. . . . Not only are the most important basic data not available; we have scarcely even begun to decide what questions we want answered.[2]

This was put even more pointedly by J. D. Glover when he stated:

> We do not know nearly as much about the corporation as we should. Our libraries contain more concrete clinical detail on distant primitive tribes - their motives, value systems, and methods of organizing activity - than on the

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[2]M. A. Adelman, "The Measurement of Industrial Concentration," The Review of Economics and Statistics, Vol. XXXIII (November, 1951), p.295.

> corporation in our midst. . . . Critics, generally, misconceive the nature and the functioning of one of the most distinguishing features of modern society - the business corporation.[3]

These ominous warnings by respected writers in the field are, of course, not without good foundation of fact. One of the major problems for the study in the year 1955, is that the most current statistical data available, with minor exceptions, is from the 1947-1950 period and much of that is in dispute. The Federal Trade Commission, itself, has difficulty keeping track of mergers and their effects on concentration in industry. In 1952 Adelman chided the FTC in this respect by noting:

> Incidentally, the FTC report on the merger movement, issued in 1948, contained the 1947 merger totals. This prompt publication was very welcome. But here it is 1952, and there are still no figures, or the promise of any figures for the 1948 and later years.[4]

In addition to the problem of numbers of mergers, other FTC facts and figures do not at all times tie into ones made available by certain periodicals, books, or research institutions, and, by their own admissions,[5] often appear only as estimates. These factors make overall comparisons and conclusions difficult at best.

Some Definitions

The first question that must be answered is, "What

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[3]J. D. Glover, The Attack on Big Business, (Norwood, Massachusetts: The Plympton Press, 1954), pp. 290,291

[4]Adelman, op.cit., p.178.

[5]Federal Trade Commission, Report on Changes in Concentration in Manufacturing, 1935 to 1947 and 1950 (Washington: Government Printing Office, 1954), p.16.

constitutes a merger?" The word merger is defined in the dictionary as, "the extinguishment of a lesser estate, right or liability in a greater one. . . . A combination of commercial interests or companies in one."[6]

The definition is more liberal than the standard interpretations of business, in stating specific differences among trusts, holding companies, consolidations, combinations, amalgamations, mergers and acquisitions. These interpretations don't often allow for the use of the all encompassing term merger. Dr. Richard Owens in his Business Organization and Combination, quite properly takes some exception to the common usage of the term and says, "the words consolidation, merger, and amalgamation are often used interchangeably, but the best usage seems to give them the distinct meanings indicated."[7] Certainly trusts and holding companies would come under the dictionary term of extinguishment of a right or liability in a greater one, but their form and shape are considerably distinct from the accepted usage of merger.

J. Fred Weston mentions the results of market concentration due to mergers[8] and M. A. Adelman states "another wave of mergers came in the period 1897-1903."[9] Both of these

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[6]Funk & Wagnalls, The New College Standard Dictionary, (New York: Funk & Wagnalls Company), 1947-1950, p.746.

[7]Richard Norman Owens, Business Organization and Combination, (New York: Prentice-Hall, 1951-1953), p.344.

[8]J. Fred Weston, The Role of Mergers in the Growth of Large Firms, (Berkely and Los Angeles: University of California Press, 1953), p.31.

[9]Adelman, op.cit., pp. 293.

comments encompass trusts and holding companies as well as mergers, amalgamations, or acquisitions. The Federal Trade Commission recognizes four merger movements,[10] and speaks of "The underlying economic forces that appear to have precipitated the recent merger movement."[11] The Department of Justice states, "each merger will be weighed on its own merits, and no one should jumpt to the conclusion all amalgamations are going to be banned."[12]

Through the years the term "merger" has been so frequently used by authors, the FTC, the Department of Justice, and Business, to indicate all forms of business unit organization, that it has become a generic term and by necessity used in this study in its broadest sense. In addition, most authors make little distinction in other terms and it will be noted that combinations and consolidations soon take on the same conotation as merger. Although these terms are so used, it does not mean that the specific meanings of the various forms should not be considered and, therefore, they are given here.

> The Trusts.--The trust device, well known and long used for other purposes, involves the holding of property by a trustee who has power to administer it and receive the income from it, both property and income to be used by the trustee as directed in the trust agreement. . . . The business trust

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[10] Federal Trade Commission, "The Merger Movement" (Washington, Government Printing Office, 1948), p. v.

[11] Federal Trade Commission, Press Release, "FTC to Survey Mergers," (Washington: FTC October 26, 1954), p.5.

[12] The Wall Street Journal, "Brownell Formally Announces Decision to Bar a Merger of Bethlehem and Youngstown," (New York, October 1, 1954).

was ordinarily a corporate organization formed to control a number of corporations through holding their stock. The original owners of the stock turned their securities over to the trustee corporation, and received "trust certificates" on which dividends were paid. They remained technically owners of the stock, but power to vote was transferred to the trustee organization.[13]

The holding companies.-- The holding company is similar to the trust. There is one primary difference. The trust simply holds the shares of the controlled companies as trustee; it does not own them outright. The holding company buys up securities to get power over the companies that it wants to control. As the name indicates, the holding company typically owns and holds securities of other corporations; it frequently owns no land, machinery, or other such operating property itself.[14]

Consolidations.-- A consolidation is the combining of business units that formerly were independent companies into a single corporation. The consolidated company holds and owns the assets or properties of the consolidating companies, not their stocks. The companies that are absorbed cease to exist; their charters are surrendered to the state that granted them, and their corporate organizations are discontinued.[15]

Combination.-- A combination may or may not take the form of a consolidation. A combination is defined as two or more previously independent firms united by a charter obtained especially for that purpose, thus excluding purchases, exchanges of stock, and holding companies.[16] This is a form of consolidation.

Amalgamation.-- This is synonymous with a combination.

Merger.-- Besides the dictionary definition, it is normally

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[13]Bowman and Bach, *op.cit.*, p.65.

[14]*Ibid.*

[15]Owens, *op.cit.*,

[16]Adelman, *op.cit.*, p.294.

considered that a firm is merged when, ". . . one of the firms may take over the assets ofthe others without the formation of a new corporation, though it may be necessary to secure an amendment to its charter permitting the issue of additional stock in payment for the assets acquired.[17] This is a form of consolidation.

Acquisition (of assets).--Although acquisition may be used in a much broader sense, it is considered in the discussions of the antitrust laws that it has to do with the "merger" of two firms by way of purchase of assets only, by the acquiring firm, leaving the corporate shell of the acquired firm.

An additional interpretation in this section should be made for the use of the word antitrust. The Sherman Act of 1890 was passed by the Congress to outlaw trusts. The use of the term Sherman Antitrust Act was soon coined, and ever since most legislation against "restraints of trade" have been termed antitrust laws and are so referred to by the FTC, the Department of Justice, and the Congress.

A Solution?

Dr. Barnes cautioned in seeking an answer to the problem when he imparted the advice that the information sought was mostly unavailable although the FTC would welcome a study such as was outlined. He did believe, however, that if avenues of questions or problems to be investigated were opened, then a contribution to the merger movement could be made.[18]

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[17]Owens, op. cit.

[18]Discussions with Dr. Irston Barnes, Economist, Federal Trade Commission, Washington, D. C., personal interview, August 1954.

An additional warning was of a different nature but one that seems most appropriate to this study. A. A. Berle Jr. voiced the following opinion:

> Depending on his predilection, the student may conclude that the United States is traveling "The (statist) road to serfdom," or that it is by trial and error discovering a sane method of preventing both the community and the business man from being sport of blind economic force.[19]

What does all this mean to the common man who, incidentally, doesn't become so common when it is considered that it is his future that is being determined? This study is undertaken to review the mass of contradiction that is before us, and to present a resume of the problem with resulting recommendations and conclusions from someone who is neither an economist preaching pure competition, a follower of socialism preaching government intervention, or a business man desirous of protecting his advances in competition. This common man is merely desirous of protecting the heritage that is his in "the American way of life."

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[19] A. A. Berle Jr., "The Measurement of Industrial Concentration," The Review of Economics and Statistics, Vol. XXXIV No. 1, February 1952, p.173.

CHAPTER I

HISTORY OF THE MERGER MOVEMENT

"The house is certainly not a finished and furnished one - there are too many glaring lacunae and too many unfulfilled desiderata." Joseph A. Schumpeter.

The history of American business during the past hundred years makes inspirational reading. It is a history studded with constantly changing patterns of doing business to meet the ever growing problem of competition. What's more, it is a history of American ingenuity, not just in the sense of innovation, but in the larger sense of increasing the standard of living in what has become known the world over as "the American way of life."

The Period from 1860 to 1891

In considering the history of mergers and their effect on competition the belief is often expressed that they are a product of modern business and born of the era of corporations. Insofar as the present problem is concerned that belief is unquestionably correct but it is more than significant to reflect that in the writings on the earliest crafts and guilds there were reported stories of "getting together for the common good." A Guild member who sold his wares below the amount considered a fair day's pay was, indeed, an outcast to his trade.

Although the English common law, dealing with the subject, was well understood and had been accepted as part of the community of business regulations in that country, it was not until after the Civil War that "restraints of trade" were considered as a problem in the United States. The increased scale of manufacturing establishments and the birth of a great many new industries soon led to activity in combinations of business enterprise. In retrospect, it might be considered that this was a natural reaction to the times. Larger scale production required new financing, the new technical innovations required development, and the spreading railroad systems heralded the possibilities of nation-wide distribution with the hope of obtaining control of the new markets.

It was in this age that the whisky, oil, sugar, aluminum, lead, steel, and rubber trusts, amidst none too profitable publicity, took on the forms of monopoly.

The Public, Congress, and The American Federation of Labor, were quick to grasp at this "monopolistic giant." In 1888, George Gunton wrote:

> Indeed, the public mind has begun to assume a state of apprehension, almost amounting to alarm, regarding the evil economics and social tendencies of these organizations . . . the social atmosphere seems to be surcharged with an indefinite, but unexpressable fear of trusts.[1]

In addition, the Democratic platform of 1890 stated:

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[1] George Gunton, "The Economic and Social Aspect of Trusts" <u>Political Science Quarterly</u>, September 1888, p. 385.

> . . . the interests of the people are betrayed when . . . trusts and combinations are permitted to exist because they "rob the body of our citizens by depriving them of the benefits of natural competition.[2]

The answer of the Congress to these demands was rapid and what they believed to be positive. The Sherman Antitrust Act was passed in 1890 and became the first formal attempt to regulate mergers.

The Period from 1891 to 1919

The panic of 1893 put a sudden stop to all kinds of company promotion and expansion. The Labor Commissioner for the United States Government stated at the time that "we were economically depressed because we had finished the job of invention and production."[3] Little did he dream that a few years later the greatest alliance of business firms in history was to commence as a result of the "invention and production of the era."

The First Merger Movement

While authors vary considerably on the exact number and length of the various merger movements, it is generally accepted that the first one of major importance began in 1898 and continued until 1903 or 1904. Henry Seager and Charles Gulick, Jr. painted the following picture of the prior merger movement:

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[2]Thomas H. McKee, The National Conventions and Platforms of all Political Parties, (Baltimore, Friendenwald 1906), pp. 235, 241.

[3]Harold G. Moulton, America's Wealth/The Last 100 Years And The Next, (Washington: The Brookings Institution, 1950), p. 4.

The organization of trusts which occured during the years from 1879 to 1896 barely attained to the dignity of a movement. Altogether there were not more than twelve important organizations formed during the entire period and their total capital was well under $1,000,000,000. The contrast between the spasmodic and irregular formation of trusts in these years and the second trust movement that set in after the return to prosperity in 1897 was very striking.[4]

The factors giving impetus to increased gains in concentration during the 1898-1903 term are generally conceded to be:

1. Relaxation of incorporating laws.
2. Privilege granted by New Jersey law for companies to hold stock in another corporation.
3. Availability of national markets by transportation
4. Management's improved production techniques.
5. Economies of large scale production.
6. Development of the investment markets and the advent of the investment banker.
7. Large financial gains to stockholders and promoters.
8. The Sherman Act
9. Tariff policies executed in the special interest of business.
10. Great new innovations in the form of invention and methods.

While some of the above reasons are self-explanatory others require further consideration.

The relaxation of the laws of incorporation, as used in this instance, largely concerns the authority to become big.

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[4]Henry R. Seager and Charles A. Gulick, Jr. Trust and Corporate Problems, (New York, 1929) p.60.

Most states prior to this time prohibited capitalization in excess of from $1,000,000. to $5,000,000. With the gradual repeal of these statutes, allowing unlimited capitalization, growth was allowed whether by merger or public sale of securities. Other aspects, concerned the "place of incorporation," allowing companies to be a New Jersey Corporation, for example, although operating in New York. This allowed the use of less restrictive laws when such use was advantageous to a new corporation.

The privilege granted by New Jersey, allowing one corporation to hold stock in another corporation, is credited by some as being the greatest single contributor to the merger movement. About the act, Edward Mead commented:

> For momentous consequesces, this statute of New Jersey is hardly to be equaled in the annals of legislation . . . the little State of New Jersey, containing two percent of the population and one and three tenths per cent of the wealth of the United States, by the simple act of amending its corporation law, nulified the antitrust laws of every State which had passed them.[5]

Stories of large financial gains to stockholders and promoters ran rampant throughout the recorded history of the period and did much to add to the distaste of "big business." William Harris's views on this are typical of many:

> These trusts were put together by bankers, and the securities they offered were so thoroughly watered that it took a generation of industrial growth and the inflation

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[5]Edward Sherwood Mead, Trust Finance, (New York: Appleton, 1920), pp. 39.

of a world war to dry them out.[6]

The Sherman Act of 1890 was passed with great expectations of being a cure-all for the problem of trusts and conspiracies in restraint of trade. Not only did the New Jersey law, which allowed corporations to hold stock in other corporations, practically nullify the act but the act itself went a long way toward causing mergers. It seems impossible that such a paradox could exist but an examination of the facts positively indicates that conspiracies outlawed by the act became legal when accomplished under the cloak of merger. What couldn't be done by five firms getting together in a conspiracy in "restraint of trade" could be accomplished by the same five firms consolidating into one firm.[7]

The period was also significant for many new inventions and improvements on existing machines and techniques. Notable among these were the Benz high speed internal combustion engine which accelerated the advent of automobiles, trucks, and tractors. The moving picture, x-ray, telephone and telegraph cable, and the airplane were all a part of the period. In addition, Frederick Taylor brought to industry new production ideas, and Ford introduced the production line technique. Manufacturing workers increased during the 1891-1910 period by forty per cent and productivity was increased by sixty-seven percent.[8]

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[6]William B. Harris, "The Urge to Merge," Fortune, (November 1954), p. 102.

[7]Temporary National Economic Committee, Record of Proceedings, December 1, 1938 to January 20, 1939, Part I, Economic Prologue (Washington: Government Printing Office, 1939), p. 112.

[8]Moulton, op.cit., pp. 15, 17.

Notwithstanding the stunning advances the country was making, the growing pains were beginning to hurt. Mead said of this:

> . . . . Four years have sufficed to reorganize the leading industries of the United States along lines of consolidation. . . . Hardly an industry has escaped . . .[9]

There is considerable difference of opinion among writers as to the exact number of combines formed during this period. The differences in count, however, were not so much a matter of mathematics as of the continuing problem of what we are counting.

The Census Bureau, in its compilation of consolidations, listed 185 combinations formed up to June 30, 1900.[10] Luther Conant, Jr., published a list in March of 1901 which contained 241 consolidations prior to 1900, "of which 87 or over one-third were organized in 1899 alone." Conant observed:

> The movement in that year in fact developed into a craze on the part of the greedy promoters and vendors to unload properties upon the public at enormous prices."[11]

The Census listing broke the 185 consolidations down to 65 as having been made prior to 1897, with the balance having been formed between 1897 and 1900. The breakdown of Conant's figures were comparable considering the additional numbers reported.

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[9]Mead, op.cit., p. 2

[10]Twelfth Census of the United States, 1900 Vol. VII, Part I, as cited by M. A. Adelman, "The Measurement of Industrial Concentration," Review of Economics and Statistics, Vol.XXXIII, November 1951, p. 270

[11]Luther Conant, Jr. Publications of the American Statistical Asso., March 1901 as cited by George W. Stocking in "Four Comments on the Measurement of Industrial Concentration" The Review of Economics and Statistics, Vol.XXXIV, No. 1, February 1954, p. 162.

The Census Bureau and Conant reported only through the year 1900. One of the most often quoted authorities on the numbers of consolidations was John Moody, who made a painstaking listing of over 300 of them for the period ending in 1903. Of 92 large mergers studied by Moody, 78 are reported to have resulted in control of 50 per cent or more of the output of the industry.[12]

The size and shape of the future business organizations of the United States were taking form. Most people didn't like what they saw. Of this George Stocking said:

> Perhaps never in all the rest of industrial history have such comprehensive and significant changes in the structure of a peacetime economy taken place in a period so short.[13]

The effects of the new concentration in industry were becoming apparent and efforts were being expended to obtain an amendment to the Sherman Antitrust Act.[14] All such efforts were unsuccessful; however, 1914 saw the passage of two important pieces of legislation. The Clayton Act was introduced and passed to prohibit, among other things, "the acquisition of stock or other share capital, when such acquisition would substantially lessen competition or tend to create a monopoly." The Federal Trade Commission Act was introduced, and passed,

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[12]John Moody, The Truth About Trusts, (New York: Moody Publishing Co., 1904), pp. 486, 487.

[13]George W. Stocking, Four Comments on "The Measurement of Industrial Concentration," The Review of Economics and Statistics, Vol. XXXIV, No. 1, February 1952, p. 161.

[14]Amending Anti-Trust Act, Senate Report 848, 60th Congress, 2nd sess., 1909.

as a means of extending control over practices in restraint of trade, as well as to form a body that could undertake investigations in the public interest. Both these acts will be explained further in the Chapter on "The Law of Mergers."

As in the case of the Sherman Act, the high hopes of the Clayton Act sponsors were soon dimmed. It did not become the power it was expected to be. In addition, the Federal Trade Commission, which has been organized under the Federal Trade Commission Act, was having its difficulties with the courts. The end of this period was significant for the reason that mergers had come to a standstill.

The Period from 1919 to 1941

Although considerable merger activity was noted in 1920 and 1921, it was not until 1924 that it again forshadowed what could be designated as a movement. While the "second merger movement" was not to be compared to the earlier one, it still was of lasting importance.

The Second Merger Movement

The principal forces of the period appeared to be the great technological gains by integration, the advent of national advertising by radio, making bigness a requirement if production and distribution were to be of advantage, and the strong bull market of security prices, which when compared to the earlier period again indicated that there were strong profits to be gained by mergers.

This cycle saw the loss of 9102 business firms through the process of merger with over 2000 developing during the 1928-1929 boom (Table I). While the number is considerably larger than that noted in the 1898-1903 term, it must be remembered that with the great growth of the nation the number of business firms was also growing, and the relative importance was not as pronounced. M. A. Adelman did state, however, that, "Increased concentration during the 1924-29 period may be regarded as proved . . ."[15]

While the extended depression of the early thirties is quoted by some authors as being responsible for additional consolidations, the actual numbers were so small that the 1932-1941 period is listed as being memorable for the absence of merger activity. Notwithstanding this, the era is noted for the considerable number of writings on business cycles, competition, concentration in industry, and the results of such activity upon the economy of the nation. For an understanding of the tempo of the times the warnings of A. A. Berle and Gardener C. Means, are cited. They said in 1932:

> Just what does this rapid growth of the big companies promise for the future? Let us project the trend of the growth of . . . the twenty years 1909 to 1929, then 70 per cent of all corporate activity would be carried on by two hundred corporations by 1950. If the more rapid rates of growth from 1924 to 1929 were maintained for the next twenty years, 85 percent of corporate wealth would be held by the two hundred huge units. It would take only forty years at the 1909-1929 rate or only thirty years at the 1924-1929 rate for all corporate activity and practically all

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[15]Adelman, op. cit., p. 285.

> industrial activity to be absorbed by two hundred giant companies.[16]

As in the past, when public reaction was hostile to big business and the consolidation movements, the government took steps to balance the situation. Thus enters the history of the next epoch.

The Period from 1941 to the Present

The inadequacy of the staff and limitations of finances seriously handicapped the FTC in its enforcement of the Clayton Act and the Federal Trade Commission Act. The Department of Justice had been no better off in their ability to prosecute under the Sherman Act. Of this Corwin D. Edwards said in 1941:

> In spite of the expansion of the last four years, the Antitrust Division's appropriation is still less than that for the Smithsonian Institution, and this sum is obviously not enough to prevent monopolies and restraints of trade throughout American industry.[17]

These had presented an almost insurmountable disadvantage to government action. In 1941 new life was put into the FTC. With an expanded staff it commenced to look into all branches of industry, rather than to take the less aggressive method of waiting for complaints on a case to case basis. The Department of Justice also shared in this staff increase but only to the extent that it could investigate one or two industries at a time.

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[16] A. A. Berle and Gardner C. Means, <u>The Modern Corporation and Private Property</u>, (New York:Commerce Clearing House, 1932), pp. 40-41.

[17] Corwin D. Edwards, "The New Antitrust Procedures," in C J. Friedrich and Edward S. Mason, <u>Public Policy</u> (Brattleboro: Vermont Printing Co., 1941), p. 324.

The Third Merger Movement

This action was well timed as the year 1941 indicated that another merger movement was underway although authors disagree as to the size and significance of it. The FTC reported 2450 absorptions during the period 1940-1947.[18] although this figure doesn't agree with Table I which lists 2062. Commenting on the later years of this action, M. A. Adelman discounted its importance. He said:

> The average annual number of mergers in 1946-47 as compiled by the FTC, was about one third as high as in 1929, and was exceeded by 10 out of the 13 years 1919-31. Moreover there were more firms in existence during the 1940's so that the rate of merger would need to be adjusted down.[19]

As in the past, each new increase in merger activity was met with public demands for more controls. This period was to be no exception. After many years of debate and two attempts which failed, 1950 saw the passage of an Amendment to the Clayton Act. The Amended Section 7 now brought "acquisitions of assets" within the prohibitions of the law by the following language:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.

The FTC believed at last that the loophole of the Clayton Act had been plugged.

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[18]Federal Trade Commission, The Merger Movement, op.cit. p. 17.

[19]Adelman, op.cit., p. 294.

The Present Merger Movement

No real breaking point can be made between the third merger movement and the present one, unless 1949 were chosen, as the low point for the period. It might even be better to consider them as one. However, the size and extent of what has been happening recently is of such magnitude that it deserves separate consideration.

The great number of consolidations that have taken place during the past five years can only be compared to the 1925-1930 period in all of recorded history. The FTC reported that for the years 1950-53 an average of 700 firms a year were lost through merger.[20] It is considered important to re-emphasize that no absolute totals of mergers could be found even at the commission. In reference to the FTC figures, we only have to look at their annual report of 1952, and note that they speak of instituting "a program of listing and making preliminary examination of all mergers within the Commission's jurisdiction."[21]

Another warning, as to possible misinterpretation of the increase in mergers, must be injected. The rate of mergers or numbers mean little, without an understanding of the resulting effect on concentration, competition, public policy, or consumer benefits. Of this, the Chairman of the FTC made the following comments:

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[20] Annual Report of the Federal Trade Commission, 1950, 1951, 1952, 1953, (Washington: Government Printing Office, June 30, 1950, 1951, 1952, 1953).

[21] Annual Report of the Federal Trade Commission, 1952, op.cit., p.31.

> . . . these figures throw no light on the magnitude or significance of the mergers involved or the extent to which they affect competition in specific market areas. . . . What is needed is an analysis of mergers in recent years to determine their effect on competition in specific market areas. We believe that information can be obtained to show the effect on competition of the current wave of mergers, and also to determine the nature of the wave and the forces that underlie it.[22]

An example of just one of the considerations that would have to be examined in comparing this period with any prior one would be the growth in numbers of manufacturing firms. In 1935 there were 200,000 such firms, while in 1950 there were approximately 300,000, notwithstanding all the loss through absorptions by merger.[23]

History has a way of repeating itself, and the present merger movement was not to be without its investigation. At the time the FTC commented on the significance of the mergers in the present wave, it also announced "a speedy but thorough economic investigation of recent corporate mergers and acquisitions." The purpose of this investigation was stated to be "To provide documented facts on mergers for the information of the Commission, the Department of Justice, the Congress, and the public."[24]

The history of the merger movement would not be complete without considering the impact of the various pieces of legislation and the separate investigations conducted by the FTC and the

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[22]Federal Trade Commission, Press Release "FTC to Survey Mergers," op.cit., p. 2.

[23]Federal Trade Commission, Report on Changes in Concentration, 1935 to 1947 and 1950, (Washington: Government Printing Office, 1954), p. 19.

[24]Federal Trade Commission, Press Release, "FTC to Survey Mergers," op.cit., p. 1.

Department of Justice on their avowed purpose of restricting mergers, concentration, and monopolistic practices. These topics will be discussed under "The Law of Mergers," but for the moment it can be stated that the agencies of Government have gained little.

Table I indicates a sharp drop in the 1954 rate of mergers, although some of these have been of massive size. Could this indicate that mergers have cyclical tendencies? Could this be the beginning of the end of this cycle?

The history of mergers is far from complete!

TABLE I

NUMBER OF MANUFACTURING AND MINING CONCERNS ACQUIRED OR MERGED

Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Annual Total
1919	57	82	147	125	411
1920	209	186	188	166	749
1921	184	99	80	122	485
1922	86	53	82	76	297
1923	84	67	44	105	300
1924	110	71	87	85	353
1925	124	104	127	175	530
1926	286	236	171	146	839
1927	161	247	220	213	841
1928	197	315	242	274	1,028
1929	349	395	312	160	1,216
1930	204	237	156	189	786
1931	163	142	87	71	463
1932	7	102	46	40	195
1933	19	43	33	12	107
1934	19	25	34	23	101
1935	36	27	38	24	125
1936	39	25	27	32	123
1937	32	27	29	31	119
1938	32	20	22	33	107
1939	24	22	16	25	87
1940	29	45	30	36	140
1941	22	23	24	42	111
1942	19	17	31	51	118
1943	44	43	47	79	213
1944	68	73	79	104	324
1945	59	53	79	142	333
1946	95	132	109	83	419
1947	98	97	84	125	404
1948	65	81	60	59	265
1949	37	35	30	35	137
1950	42	51	50	57	200
1951	117	179	205	202	703
1952	189	171	244	218	822
1953	230	232	141	190	793
1954	156	139			

Source: Federal Trade Commission Press Release "FTC to Survey Mergers," October 26, 1954.

CHAPTER II

WHY MERGE

> "On Wall Street there's a saying that an epidemic of mergers marks the beginning of the end of a boom. Maybe so in the past, but this round looks different. It's being fomented not by bankers but by the managers themselves, and for sound business reasons."
>
> William B. Harris, Fortune, Nov. 1954.

It would be impossible to make an appropriate decision as to whether mergers are good or bad without understanding the reasons for them. While it may be claimed that the actual causes can never be known, some of those back of the present trend are so obvious that they can not be disputed.

That corporations have been guilty of many monopolistic practices over the years cannot be denied. Much of the criticism of trusts and mergers was well deserved and it will be up to the business man, himself, to prove his present case, or possibly up to the public to disprove it. Perhaps only history will give the answer but when the time does come, it is doubtful that matters will appear quite as dismal as William Harris describes them in the "second merger movement:"

> Corporations were merged to provide glamorous new securities for a speculation-mad public. Stocks of merged companies sold quickly at huge premiums. . . . When the crash came it was discovered that much of this merging was evil, particularly the sale of public-utility holding-company debentures and preferred stocks. The Insulls and the Hopsons of the period and the bankers who worked with them, put Wall Street under a cloud from which it has never fully emerged."[1]

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[1]Harris, *op.cit.*, p. 102

The Makers of Mergers

The present merger movement appears to lack its Insulls and Hopsons. It also is lacking in the interest of the powerful financiers from Wall Street who are so often characterized as wolves. It would be naive, however, to believe that there wasn't some high finance behind the ability to buy corporations at a cost of $100,000,000. or to imagine that there were not some experienced financiers putting the combinations together. It would be just as naive to accept the idea that if evil forces were actually doing the "business" that the watchdogs of public interest wouldn't have ferreted them out by now.

Like any successful business, however, as industries grow the need for a broker develops so also as mergers become successful, a function for brokers appears. Consequently, at this time, many persons propose mergers to corporate managers. Most of these persons do little good for themselves or the corporations they approach. The proposing of mergers for the sake of merger is bad, both for the reputation of business as a whole and for the firms so merged. Few, if any, of these promoters could effect mergers of major corporations.

This does not mean, however, that mergers have not been engineered. Reputable firms have been required to offer services in the intricate business of merging American industry. Bankers would be remiss if they did not offer assistance, for the protection of both their own investments and their customers' interests. In addition, the corporations, themselves, do not always have

the required "know-how" to provide the means or preparation for their known requirements. It is at this point that they often require the aid of management consultants. Some consulting firms have set up full departments to handle the needs of their clients. Other reputable consulting firms are continually making studies for determining values of companies proposed for merger. The large corporation, itself, has been so bombarded with such requests that it often requires departments to be established to deal with them. For example, the Comptroller of Allied Chemical & Dye Corp., indicated recently that opportunities for merger were presented daily.[2]

While the merger broker must be considered as being in the present picture, a careful reading of all the articles pertaining to the reasons back of the unions, as well as interviews with corporate officials could not help but bring out the conclusion that the managements of business are the dominant proponents in the present marriages of business enterprises.

Types of Mergers

There are four general catagories of mergers. They are known as the horizontal, vertical, conglomerate, and allied. The FTC, while recognizing the four, actually lists mergers only under the three categories of horizontal, vertical and conglomerate. The allied are placed in the horizontal group which accounts for 60 per cent of the total, while the other two types account

[2]Discussions with F. L. Linton, Comptroller, Allied Chemical & Dye Corp., personal interview, August, 1954.

for 20 per cent each.[3] Each of these is briefly outlined.

The Horizontal Merger

A consolidation of business enterprise is said to be horizontal when the businesses carry on production of the same product or the same stage in the production of some product. For example, when Allied Chemical purchased Mutual Chemical the merger was horizontal for the reason that Allied gained nothing for its own plants. It was merely the addition of another firm doing a chemical business at the same stages of production. The fact that Mutual manufactured a product that Allied, itself, did not make has no importance in discussing the type of merger, although it is a major consideration in presenting the reasons for merger.

The merger of Packard and Studebaker is another illustration of a horizontal merger. In this case the products were identical, although in different styles and price ranges. The products were identical because they served the same purpose.

The Vertical Merger

A merger of business enterprise is said to be vertical when it involves the control over two different stages of production. Bethlehem Steel represents a completely integrated corporation as it controls the manufacture and distribution of the raw material from processing through to the finished product. The entry of Pittsburg Plate Glass Co. into the chemical field by merging with Southern Chemical, to gain a supply of soda ash for the making of glass is an example of a vertical merger and

[3]Federal Trade Commission, "The Merger Movement: A Summary Report," (Washington: Government Printing Office, 1948) p. 5.

The Standard Oil Company of Ohio in entering the transportation and refining fields for the production, processing, and distribution of their products made for vertical integration.

Vertical mergers can go either forward toward the sales room, or backward to the source of supply.

The Conglomerate Merger

The conglomerate merger is made by joining companies engaged in business enterprises that have no relationship to each other, and forming the results of the combinations into operating-holding companies with each unit being maintained as a division. The acquisitions of the American Home Products Corporation are examples of conglomerate mergers. This corporation consists of fifty subsidiaries engaged in the manufacture and sale of 5,000 products in many unrelated fields such as chemicals, food specialties, paints, insecticides and cosmetics.[4]

The Allied Merger

A merger is said to be allied if the merged firms produce different commodities or services but the manufacturing process or channels of distribution are the same. The acquisition by General Foods Corporation of Maxwell House Coffee, Calumet baking powder or Walter Bakers chocolate are examples of allied mergers. Allied mergers are a form of horizontal movement but have individuality of their own.

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[4]Federal Trade Commission, The Merger Movement, op.cit., p. 62, as cited by Owens, op.cit., p.421.

Reasons for Merger

In considering any specific merger, many reasons may be involved. In other cases it might well be that there was but one paramount motive for each party. It is because of these conditions that the merger reasons given here are grouped in broad categories with examples cited of various pertinent cases.

For Tax Savings

Tax laws of the United States Government have been subject to continual demand for change. Probably in no other corner of the legislative arena have pressure groups been so active in demanding "special considerations." It is paradoxical, however, to see the Congress pass laws in an attempt to restrict mergers and at the same time pass laws that encourage them.

Tax savings come under four general descriptions. One is the estate tax, the second the "loss carry-back" tax, the third is the taxation on dividends and the fourth is the tax writeoff.

The estate tax.--Having an estate liquid enough to pay inheritance taxes is becoming one of the most difficult problems to the owners of business. The economist dreams of a system of competition where there are many competitors, none of a size that could be called big business, and all working in what is termed pure competition. Facts contradict this dream. The business man, who has kept within the bounds of pure competition, leaves financial ruin for his company and heirs after his death. This non-fictional business man has introduced his capital and know-how and throughout his life has seen his firm grow and prosper.

On consultation with his tax advisor he soon finds that the heritage he will leave is in the form of estate taxes, that approach confiscation of his life-time effort. Many businesses have been sold to meet these taxes, with the often result that fine, competitive firms were lost to the community. What is the easiest way out of this dilemma? The answer is simple - merger.

In the previous example of merger activity between Allied Chemical and Mutual Chemical the reason for the owners of Mutual can be put down under the heading of estate taxes. Mutual was a family owned corporation that had grown to distinguished success. That was its error! If death preceded merger the work of a lifetime would be interupted during reorganization or liquidation.[5]

Richard Smith, reporting in Fortune, left little doubt that one of the compelling reasons that Olin Chemical wanted Mathieson Chemical was the fact that 58 per cent of the Olin stock, worth over one hundred million dollars was closely held within the family.[6] Quoting William Harris in Fortune, again, we see the specter of tax. When commenting on the merger of Benson & Hedges with Phillip Morris he noted:

> Hedges, sales $7 million in '53, was run by 72 year old Joseph Cullman. The Cullman's family control of the corporation was such that should Joseph Cullman die the corporation probably would have had to be liquidated at great embarrassment to the Cullmans. The liquidity demanded in estates was easily obtained by merger.[7]

How does the merger help this problem? The answer is too simple. The owners of Mutual Chemical received shares of

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[5]Linton, op.cit.

[6]Richard Austin Smith, "The Olin Mathieson Deal," Fortune, November 1954, pp. 110 ff.

[7]Harris, op.cit., p. 106.

Allied Chemical & Dye stock in return for the total assets and stock of the company. The business will go on indefinitely, the Mutual name will continue, the community and public benefits will continue, but the family will have liquid shares of Allied in which to pay the estate tax when that day comes. The only change is that Mutual will be operated as a division of Allied Chemical & Dye Corp.[8]

Loss carry-back tax.--After many years of study in the accounting profession a student would have difficulty in facing the fact that losses are profits, and defunct corporations ready for bankruptcy are worth many millions of dollars. Only the most modern of text books would carry this latest twist to the old ideas that profits are profits and losses are losses.

The tax laws of our country, in dealing with the business man, are designed quite fairly to put the burden of tax on his average earnings over a period. Thus if he reported a profit of $100,000. last year, and paid a tax of say $50,000., and this year reported a loss of $100,000., he would be entitled to a refund of the $50,000. as his average profit over the two year period was zero.

The process seems quite simple. The question, however, arises about how a loss can be made into a profit. This comes about when the business man has only losses and no profits, or if he has profits and through merger sells the business at a loss.

Although other reasons were cited, the carry-back was one of the Kaiser-Willys' inducements to merger. Kaiser had huge

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[8]Linton, op.cit.

losses totaling millions of dollars, while Willys was doing quite well as a growing automobile manufacturer. By process of merger the company then had large losses to claim as refunds from the government on the taxes paid by Willys.[9] In this particular case it is reported that the reason backfired because Willys soon had their own losses to contend with also.

To better explain the carry-back process an actual case study used by Harris shows the intricate workings of the scheme.[10] This instance deals with the carry-back loss, the defunct company, and estate taxes.

The case concerns a firebrick company whose stock was closely held by the family. Due to their fear of estate taxes, they desired to liquidate the best they could but their asking price of $4,000.000. in stock of a strong corporation was too much for possible purchasers. This situation did not disturb the modern accountant who was used to dealing in losses as profits. The buying firm actually paid only $1,700,000. in cash yet the family gathered all the net cash that they could possibly have received had they sold the company for the original asking price of $4,000,000. stock less the 25 per cent capital gains tax and, in addition, they still had their company! The process was quite simple.

The assets of the firebrick company were acquired for the $1,700,000. cash. These assets were carried on the books of the firebrick company at an approximate value of $3,700,000. The

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[9]"Why Kaiser Bought Willys," <u>Business Week</u>, March 18, 1953, p. 32.

[10]Harris, <u>op.cit</u>., p.104.

purchasing company, therefore, bought assets valued at $3,700,000. for only $1,700,000 or a $2,000,000 possible profit. This in itself was reason enough for them to want to merge. The possible profit to the buying company was a realized loss to the selling company. The family immediately applied for their loss carry-back against prior taxes paid and the Treasury Department "donated" the balance of the purchase price to the family in the form of a rebate of $1,500,000. This gave the family a net cash sale of $3,200,000. for their assets against $3,000,000. net had they sold for stock and they still held valuable losses in the form of the useless corporation which itself could now be sold again.

The tax figures being dealt with in this discussion are not small. We have only to look at the Howard Hughes - RKO deal to see the staggering effects of tax loss. After Howard Hughes purchased all the assets of RKO, the corporate shell that remained was worth a reported $20,000,000. in losses.

The FTC can complain about this type of merger, and the Treasury can continue its endeavor to thwart it, but the pure mathematics still makes an interesting story to the enterprising businessman, a story he is likely to continue to read.

The Dividend Tax.--Perhaps the least used, of the tax advantages to mergers, is that dealing with dividends; however, it is no less important to the discussion of taxes as a cause of mergers.

There are two aspects of dividend tax. The first has to do with double taxation, and the second to taxable income. This advantage usually has more significance to the corporation in

which sizable holdings of stock are maintained by a limited number of individuals. Again this might be the picture of the corporation the economist would paint if he were to illustrate the perfect corporation. That perfect corporation in the eyes of the economist is a monster in the eyes of those who bred it.

Reverting to the history of the business enterprise founded by the family, as portrayed in the section dealing with estate taxes, we see a growing firm that is an asset to the community. As it makes its place in the economy it expands and profits result. The profits are quite properly taxed by the various levels of government. In addition, the company has a residue which is, as a rule of thumb, split equally between expansion of the business, and return on investment to the stockholders. These dividends are then considered as income to the stockholder, with minor exceptions, and are once more taxed. When stock is held to a degree that control of dividends can easily be determined, such control often prefers to restrict this double taxation by leaving a greater percentage of the income in the business.

An additional, and more potent, reason for leaving these profits in the business comes from the stockholders who, having sufficient income, are in the tax brackets where little is left on additional income.

We can investigate the control and the history of the growth of certain firms and note this trend towards evasion of dividend taxes. The Pittsburg Plate Glass Co. was originally a family corporation. Today that family holds approximately three million shares of common stock in the corporation, and virtually

has voting control. If dividends of that corporation were comparable to the average big business firm, the income of the recipients would certainly reach prohibitive rates, returning approximately ten cents on the dollar. Little interest could be generated under such tax laws to make the owners remain as little business.

What are the results in cases such as Pittsburg Plate Glass? Dividends are kept to a bare minimum, money is plowed back into the corporation, growth takes the form of merger, as well as internal expansion, and profits to the stockholders take the form of capital gains at a rate of 25 percent.[11] Once more the merger is stimulated by the tax laws!

The tax write off.--Tax laws of recent vintage have been quite favorable to merger in the allowance for quick write-offs due to war necessity or depletion of natural resources. This has been especially conducive to vertical integration in the crude oil field although not much less of a factor in all extractive industries.

McLean & Haigh writing in the Harvard Business Review voiced the following opinion:

> The tax provisions for expensing intangible drilling costs are such that a company can expand its producing operations on a very favorable basis at times when it is exposed to high tax rates.[12]

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[11]Discussions with T. W. Collins, General Personnel Director, Pittsburg Plate Glass Co., Pittsburgh, Pa., Personal interview, November 1954.

[12]J. G. McLean and R. W. Haigh, "How Business Corporations Grow," Harvard Business Review, Vol. 32 No. 6, November-December 1954, p. 86.

Bernard Rodey, Jr, a recognized Expert on corporate taxation, discounted any great importance to this phase of the tax system in developing extensive mergers, although he acknowledged that it would be profitable, and had probably accounted for some consolidations.[13]

Merger for Financial Reasons

Financial reasons for merger probably cover a multitude of motives. Part of these considerations are combined with other aspects. Certainly all the factors under the section dealing with tax can also be said to be financial. Those reasons won't be repeated, but are no less a part of this section.

Finance in this instance concerns itself with the requirements for capital, idle funds, cost factors for expansion, purchase for profit, and financial gains of promoters.

Requirement for capital.---One of the most difficult problems of the small business man is the requirement for capital in which to finance research, expansion, or product introduction. This weakness can quickly be solved by merger with a large well financed concern. This was the case of O-Cel-O. The initial success of this small business was typical of the opportunities available to men with ideas. As demand for the product sharply increased, the producers were unable to cope with the requirements of plant, equipment, and subsidiary requirements for

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[13]Discussions with Bernard S. Rodey, Jr., Assistant Secretary and Tax Manager, Consolidated Edison Company of New York, personal interview, December, 1954.

launching a major "ship" into the business world. General Mills came to the rescue with all the inducements necessary--money and position.[14]

Idle funds.--Although the case of Pittsburg Plate Glass is a prime example of this section, further comment is deemed desirable. The present amount of available investment capital in the United States is becoming a problem to many business firms. This is especially true of the large insurance companies. Interest rates are falling and those interested in placing their available money in the most profitable manner are looking for good investments. The building of new industries or adding to the output capacity of present industries is a risky investment at the very best. Investment at the present time in profitable going concerns is considerably better from a return-on-investment standpoint than any other form of outlay. Thus, mergers are a logical result.

Cost considerations for expansion.--Once the decision has been made that a firm's growth indicates expansion requirements and the financing is available, the next decision is how to proceed. When Bethlehem Steel felt the need to match the expansion of United States Steel the question was the one posed above. To build a plant the size of Youngstown Steel would be financially out of the question. At today's prices it would just not be feasible. Youngstown was available, however, and at a "price" that was mutually beneficial to both although not

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14. "When a Small Company Joins a Giant," Business Week, September 19, 1953, p. 43 ff.

presently considered an acceptable merger by the Department of Justice.[15]

Another fact for consideration is that expansion by merger often does not cost any money, while expansion by building would be extremely expensive. Turning to the Allied Chemical - Mutual Chemical merger, it can be seen that in actuality the acquisition of Mutual cost Allied absolutely nothing although it was a most satisfactory sale insofar as Mutual was concerned. Allied paid for Mutual in an outright purchase in the form of previously unissued common stock shares. The value of Allied shares went up after the merger, indicating that there was no loss in value. No cash exchanged hands. Allied was in the long desired chromium chemical field merely by the issuance of stock. Although the Comptroller of Allied firmly stated that this was an oversimplification, the fact remains that had Allied gone into the market place to sell the shares of stock to raise capital or had taken available capital and built plants to the extent of the acquisition, it might not have appeared quite as much like an oversimplification.[16]

Purchase for profit.--No firm would admit for publication that a merger was made for profit only. It would prefer to give such reasons for its action as expansion, diversification, or integration. A good example of this possibility, however, is

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[15]Discussions with Mr. W. R. Archerd, Assistant to Comptroller, Bethlehem Steel Company, Bethlehem, Pa., personal interview, November 1954.

[16]Linton, op.cit.

the previously mentioned case of the firebrick company whose assets worth $3,700,00. were purchased for $1,700,000. and returned a quick profit of $2,000,000.

Cases like this are not rare. Financial pages of all newspapers were calling attention to the fact that literally hundreds of concerns could have been purchased through stock acquisition during the 1940's for less than the quick assets!

Financial gain to promoters.--In the history of the merger movement we saw that, in the past, considerable importance was attached to financial gain to promoters. We have also considered, in the present chapter, the subject of promoters as a cause of mergers. Now we shall discuss financial gains to promoters in the situation as it is at present.

The types of profits here are of two kinds. If, in fact, there was a broker involved, the reasons that the merger was first proposed might well have been the possible fees or market appreciation in securities that the promoter would receive. As previously mentioned, it is doubtful if this has made many significant mergers.

The other type of financial gain is that made by stock appreciation on announcement of a merger. If a sagging or unknown firm joins a giant, there is no question but that there will be, more often than not, an appreciation in the value of the shares of that corporation before merger. History has also followed a well set pattern of an increase in value of shares when giants join giants. It might be said that there is an appreciation in value when such a merger takes place although

the facts might be hard to prove. These two kinds of appreciation are market made. Another type is that set by managers of the merger in pricing the value of new shares or the ratio of conversion on old shares. It might be very tempting to put a little water in the pot as in the past. After all, the managers are usually solid stockholders. In addition, if they expect a close vote with the common stockholders over approval of the merger plans, a little sweetening will go a long way towards making the pill easier to swallow.

Merger for Market Reasons

Under this heading will be considered growth, protection, and market control.

The growth aspects.-- No man would invest his heart and soul in the formation of a business without the hope of future success and reward for his efforts. If there were to be no reward there would be no incentive to work. With few exceptions, a business that isn't growing isn't worth having. How companies can best grow is the subject of this section.

The small business man looks with envy on his large competitor who can run off the production lines great quantities of good quality products. Although there is a difference of opinion as to when economies in size cease, it is generally accepted that the small business can not always compete with its grown up brothers. National advertising encourages the consumer to buy brand products. National channels of distribution get products to the consumer when and where he wants them. A desire for rapid expansion for economies or to meet sales demand is compelling. The methods of big business are not always the sure

way to success, but go a long way toward achieving that goal.

If the small business man does have an idea, such as the O-Cel-O case, by the time he is able to make the product and successfully market it, there may no longer be a demand for it. Harris pointed this out when commenting:

> Small producing companies, based on processes or on patents that are likely to become obsolete before they expire are merged with companies having better facilities and credit so that the product can be exploited quickly.[17]

The subjects of patents and research are often quite painful to the small business. The owners see their products cease to be in demand; their machines obsolete by innovation; and their sales transferred to competitors. In research, and invention, the small business man cannot compete to protect his investment.

The drying up of raw materials and the loss of sources of supply are as crippling to a corporation as polio could be to a person. As if this were not enough, the effects of shifts in markets and economic recessions, might well spell doom for the firm.

This picture should not be taken to mean that the situation is all black. Small business has flourished in the country for a long time and we are far from departing from a free-enterprise economy. For the moment, however, the best protection yet found for the rigors of growth is in the merger.

The buyer of a business that is growing has many

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[17]Harris, op.cit., p. 104.

advantages. The small business man, however, must look to the protecting of his interests so that he has an equal chance with his competitors.

The demands for protection.--In the chapter dealing with concentration in industry, space is given to the views of various authors on increases or decreases in concentration and relative size of businesses. Here we are concerned with the demands on American business to keep pace with the increased tempo of our economic development as well as the problem of growth. Columbia Southern Chemical Company, a subsidiary of Pittsburg Plate Glass Co., which deals in liquid chlorine, spent sixty million dollars in the last eight years on acquisitions and plant expansion. In 1946 this company stood third in its field and eight years sixty million dollars later it was still third![18] Referring again to the proposed Bethlehem-Youngstown merger, it is evident after U.S. Steel acquired western steel plants and built the Fairless plant in Bethlehem's back yard, that Bethlehem would have to take drastic action just to remain in a competitive position.

Pausing a moment, let us ask,"Why did U.S. Steel acquire Consolidated Steel in the first place?" The answer is one of shifting markets. It costs a lot of money to ship steel from Illinois to California. As the mid-west and western markets grew, with every indication of a much larger growth in the future, U.S. Steel required mills in the area to compete in price. To build such plants was costly and a long process --

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[18]Collins, op.cit.

the result was merger.[19]

Mergers for protection might also include mergers for survival. These can include industries having high unit costs and declining volume as in coal, or mergers just to stop losses as in overproduced industries such as textiles, or losses from a failing business. One of the most compelling of these, survival, often changes whole industries and often the meaning of company names.

Armstrong Cork Company is a fine example. As the costs of producing cork products rose and their use was continually diminished, Armstrong had to look for diversification to stay in business. Today through the process of merger only 10 per cent of the products sold by the company contain cork. The products accounting for the other two hundred million dollars in sales run the gamut from rugs and firebrick to plastics and munitions.[20] This was merger for survival in its finest sense and the result is a reputable concern adding much to the American business scene.

In commenting on mergers for protection, the route of horizontal and vertical acquisitions have to be explored. Horizontal mergers often are for diversification into other lines. These make a firm less vulnerable to the changing cycles of a single industry. Moreover, such diversification in plants or products, makes a firm more able to compete in all areas of the

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[19]Discussions with W. A. Walker, Vice President for Accounting, United States Steel Corporation, Pittsburg, Pennsylvania, personal interview, November, 1954

[20]Discussions with I. Wayne Keller, Controller, Armstrong Cork Co., Lancaster, Pennsylvania, personal interview, October, 1954

nation. Serious unemployment in New England textiles might adversely affect sales in the area, but with studied spreading of the sales dollar through various regions such unemployment in one area would not be serious. A good example of merger for diversification was the union of Westinghous Air Brake with Le Roi Co. Westinghouse Air Brake didn't care to be dependent on the railroad industry for survival, and the addition of this corporation dealing in industrial engines and allied equipment was the protection they were looking for.[21] Another such example was the purchase, by National Gypsum Co., of Asbestone Corp. National Gypsum wanted to be covered for future trends in the construction business. If the trend was to asbestos-cement products they would be ready.[22]

A prime example of the protection that horizontal mergers can bring is presently offered in the automotive industry. It is normal to bring out completely new models every three years with minor dressing up in the intervening years. Within the General Motors Corporation each Division has full operating authority to make such decisions as they deem necessary to produce a profit. All divisions compete with each other as completely as with "outside" competition.

In 1953 Oldsmobile broke tradition and risked large investments in a change over to a new model in two years,

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[21]Company Mergers; How, Why," Business Week, March 7, 1953, p. 29.

[22]Ibid.

bringing out their 1955 model in 1954. The results were astonishing even to Oldsmobile and 1954 could be termed their finest year. But what of Pontiac which did not make the change? Their sales went to make up the bulk of the Oldsmobile increase and the year was anything but good for the Pontiac Division and in addition it will take more than a season to get Pontiac's customers back again; another poor year in 1955 is indicated. To General Motors Corporation these two actions merely balanced each other. However, the same mistake that was made by Pontiac was made by Nash. As an independent with no protection horizontally the results were disastrous and Nash was required to merge for survival. It may not ever recover. A mistake to a big company can be a small mistake, but a mistake to a small company can spell ruin.[23]

Vertical acquisitions are also a protective device. To assure market outlets integration will go forward and acquire channels of distribution. To assure supply, or to obtain cheaper raw materials integration would go backward to the mines or production facilities. Food Machinery Corporation of California found themselves in the position of having to go vertically as a result of an allied merger. In 1943 they bought Niagara Sprayer & Chemical Co., a bulk supplier of insecticides. This move was reported to be for diversification and would be a horizontal merger in a different product field. Once Food Machinery owned the company, however, the source of raw materials

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[23] Discussions with Mr. K. F. Hardy, Director of Procedures and Methods, General Motors Corporation, Detroit, Michigan, personal interview, December, 1954.

for insecticides became such that for survival that corporation was required to move vertically and obtain Westvaco Corp., a chemical company dealing in the primary ingredients.[24]

Vertical mergers can often set off chain reactions that in some instances find companies in totally unrelated fields. Bethlehem Steel in Brazil or Cerro DePasco in Peru found that the acquisition of property and the mining of ore soon turned out to be many industries. Power had to be supplied and the corporations went into the public utility field. Workers had to be brought to the mines, and transportation companies were formed. Miles of railroads were required to move the ore and railroad divisions were organized. Living conditions for the workers required houses; houses required roads; families required grocery stores; children required schools. Money was saved and banks were established. The results of such vertical acquisitions can be endless, but in the two cases stated above no alternative was possible.[25-26]

One of the most necessary of all protective devices is the assurance of continuing and good administrative leadership. Top management is hard to find, especially for the one man family corporation. If there are no sons, the problem is intensified. Florsheim Shoe Co. was sold to International Shoe Co. because there was no one available to head the family business of

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[24]Harris, <u>op.cit.</u>, p. 104.

[25]Archerd, <u>op.cit.</u>

[26]Discussions with George R. Westby, Ass't to the Treasurer, Cerro De Pasco Corporation, New York, New York, personal interview, November 1954.

Florsheim.[27] In the Olin-Mathieson merger, in addition to certain aspects of estate taxes already mentioned, a compelling reason was given as Olin's need for management. Spencer Olin, one of the two owners, wished to retire. As there were no heirs to carry on the business for the future, the merger was necessary in order to obtain the brilliant leadership of the young president of Mathieson.[28] In the merger, also, of two of the largest banks in Washington, D. C., the Hamilton National and the National Bank of Washington, the need for capable executive management was demonstrated.[29]

The desire for market control.--Unquestionably, many writers might fill pages with discussions of acquisitions over the years that were made merely for monopoly purposes. Undoubtedly there have been mergers in the current crop that would fit this definition. It is obvious, however, that no firm would admit to such a purpose for publication.[30] The section is included to note that this may be an important consideration.

Legal Reasons

Legal conditions have added to the bidding for firms. In the banking business, branch banking is restricted by law in many localities. Since branch banking is becoming the bread and butter of the Banking industry the only way to get in on the

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27"Company Mergers: How, Why," Business Week, March 7, 1953, p. 29.

28Smith, op.cit., p. 110.

29Statement by Barnum L. Colton, President, The National Bank of Washington, Washington, D.C., personal interview, December, 1954.

30Author's note: One major firm admitted that such was the case in one of their acquisitions. They were unable to compete with a manufacturer of an identical product so purchased the company.

diversification it offers is to merge.[31]

Another legal consideration is the antitrust laws that are designed to foster competition. While this is in no way the factor that it was in the 1897-1903 period, it must be brought out that it is no less true today than at the turn of the century, What can't be done with competitors can be accomplished by merger. The Federal Trade Commission disclosed their contempt for this in saying:

> . . . Both the Sherman Act and the Federal Trade Commission Act condemn attempts to control the market by means of mutual understanding or agreement among competitors; but if the same objective is achieved through the purchase of physical property it is lawful, in absence of monopoly, and the Anti-trust agencies are powerless to act. . . . Thus the paradox is presented that the more effective is the enforcement of the law against collusion among competitors, the greater is the incentive to achieve the same objective through purchase, consolidation, and merger.[32]

In addition to the problems as noted by the Commission above, the Courts themselves were contributing to the wave of mergers. As will be noted in "The Law of Mergers," decision a after decision encouraged combinations. Of this Justice Douglas in 1949 commented:

> The economic theories which the Court has read into the antitrust laws have favored rather than discouraged monopoly. . . . [33]

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[31]F. L. Garcia, "Behind the Front in Bank Mergers," The Washington Post and Times Herald, September 5, 1954, financial page.

[32]Federal Trade Commission, "The Merger Movement: A Summary Report," op.cit., p. 2.

[33]Standard Oil Company v. United States, 337 U.S. 293 (1949).

Labor as a Cause of Mergers

Labor Unions have been credited as fostering mergers. The high labor costs of Studebaker over other automobile manufacturers forced its prices to a position where it could not compete and merger was the result. In addition, labor can extract a higher wage in industries where monopoly or near monopoly exists, as price competition isn't a strong factor, and mergers aren't opposed. Where industry is pressured for increased wages year after year one of the solutions to the squeeze on profits is combinations of firms, so that price can be controlled.

John L. Lewis, when commenting on mergers within the coal industry said:

> . . .they merged a number of smaller mines, mechanized, plowed back about 99 million into their mines and as a result have made money.[34]

Other Merger Reasons

The expense of research should be given more than passing notice. Research is one of the most costly overheads that firms can carry. It is often stated that you can't live with it and you can't live without it. If two firms have heavy expense in this direction and they are in the same field there is opportunity for savings. At the other extreme is the large growing firm that has inadequate research. The time that it would take to introduce and develop a program would be sufficient to put the firm so far behind its competitors that research would no longer be required. This was the urgent requirement of Sharp & Dohme

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[34] John L. Lewis, "Labor", Fortune, November, 1954, p. 78

when they sought merger with Merck and their fine research division.[35]

Along with research goes patents. The meeting of the minds between Diamond Alkali and Belle Alkali tells this story. Belle had patents but needed the new technology that Diamond offered. On the other hand Diamond needed patent rights to meet competition. The result was a merger.[36]

In the advertising field the shift to brand products and national advertising caught many firms unprepared. The small, perfect competitor, one man business was unable to cope with product research, national public relations, national television and radio coverage, market surveys, the making of commercial films, and the staging of television shows. If the firms were not able to do the job the business was passed on to those who could. It took a sizeable firm, with many quality executives, and well heeled pocketbooks to give the service demanded. The results were merger.[37]

Summary

In the discussions on the reasons for merger, less emphasis was placed on the savings involved by large scale operations than on the more concrete examples of profits, taxes, survival, and protection. In the history of the merger movements there has never been an indication that during depression periods

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[35] "Many Aims-One Goal," Chemical Week, May 23, 1953.

[36] Ibid.

[37] "Why Those Mergers on Madison Avenue," Business Week, December 6, 1952, pp. 43, 44.

great combines were formed for the purpose of the greater efficiency that would result. Quite the contrary, mergers appear when business is at its best. For that reason we must look elsewhere for the cause of these actions.

It is believed that the primary reasons for the current wave of mergers is the demand placed on the managers of industry to keep up with competition and to grow in the spirit of successful business. The stockholder is not always as silent as he appears. He, and the Board of Directors, demand alert up-to-date management. Profits and dividends retain management at higher salaries and better pension plans. The fastest and most profitable way to meet competition and growth problems is through merger!

J. Fred Weston in summing up his reasons for postwar mergers concludes with the views that the following were most important:

(1) An unprecedented high peacetime tax structure.
(2) low price-earnings ratios of common stocks.
(3) a desire to achieve rapid expansion in order to increase sales in a strong sellers market.[38]

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[38]J. Fred Weston, op.cit., p. 85.

CHAPTER III

THE LAW OF MERGERS

"Gentlemen, our attorneys inform me, happily, that the Sherman Act, the Clayton Act, the Celler Act, and the FTC are for the moment...ah...well, let me say...in this instance, at least...er...inoperative." Fortune, November, 1954

The history of the legal attempts to control the growth of business does not make good reading either for the lawyers or the business men. The best that can be said is that neither of them can predict the next decision of the court.

That some type of laws are required for the conduct of business is accepted even by business, itself. The basis for the laws that are now part of the statutes of the United States is best described by Sherman R. Hill, Chief Project Attorney, of the Federal Trade Commission. He commented:

> This government is committed to the maintenance of a free competitive enterprise system by historic economic policy. One of the basic means adopted to strengthen and preserve that system is the antitrust laws, one aspect of which deals particularly with mergers and acquisitions, which have long been recognized as exerting a major effect on the competitive structure of American economy, and as having inherent monopolistic tendencies.[1]

It has often been said that there is dual responsibility between the FTC and the Department of Justice in the handling of cases under antitrust statutes. This responsibility at times

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[1]Sherman R. Hill, Chief Project Attorney, Federal Trade Commission, "Acquisitions and Mergers," (Paper read before the Association of the Bar of the City of New York), November 17, 1954. p. 1.

appears to overlap and at other times seems entirely separate. Of this Charles E. Grandey, of the FTC stated:

> You may wonder why both the Department of Justice and the Commission have jurisdiction in antitrust matters. I think the distinction between the work of the two agencies in that field has been well stated, first by the Supreme Court in the Cement case, 333 U.S. 683: 'Although all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Federal Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of the Sherman Act violations.' Our Chairman, Edward F. Howrey, has explained the difference in the functions of the two agencies as follows: 'The job of the Department of Justice was to be primarily that of prosecutor. The Commission on the other hand was meant to practice preventative law through administrative and regulatory activities, as well as by the initiation and conduct of adversary proceedings. Congress foresaw, and in fact intended, some mutual responsibility, but not mere duplication. Both agencies were to work in the same field, but with different tools.' Our work does not duplicate or overlap the work of the Department of Justice. A very close liaison between the two agencies is maintained to prevent any such result.[2]

The jurisdiction of the FTC is limited to the Clayton Act and the Federal Trade Commission Act. The jurisdiction of the Department of Justice is limited to the Sherman Act and the Clayton Act. It can be seen, therefore, that both agencies can proceed under the Clayton Act. Effective liaison is required in the latter instance.

Complaints to either agency may be brought by parties believed injured by merger or a proposed merger. In other instances the agencies proceed through their own investigations,

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[2]Charles E. Grandey, Director, Bureau of Consultation, Federal Trade Commission, "The Federal Trade Commission and Your Industry," (Paper read before the National Electrical Contractors Asso., Inc., October 30, 1954.) p. 3.

although only a fraction of the total number of mergers that come to their attention can be looked into. It is for this reason that key cases are picked with the hope of setting precedents.

Investigation by the Commission usually takes the form of a letter to the acquiring and acquired firms requesting information concerning the merger or proposed merger. If after suitable investigation the Commission decides that there is cause to issue a complaint, such complaint is issued, testimony under oath is taken, findings based on the record are made, and if it so deems "cease and desist" orders issued. The FTC has no authority to approve or disapprove a merger prior to consummation, but its duty is to measure the probable effect after the merger has been accomplished.

On receipt of a cease and desist order a firm may "consent" to such decree or it may within 60 days from the date of the service request in a U.S. Court of Appeals that the order be set aside. The Court then has the power to affirm, modify or set aside the Commission's order. The decision of the Court of Appeals may be brought to the Supreme Court by either party. If no appeal is taken, the order becomes final. If later violated, the matter is given to the Attorney General and a civil or criminal penalty action is instituted in a District Court. Violations of the antitrust laws can be brought in equity with civil law, or, if deemed warranted, criminal prosecution can be instituted. The Commission brings all cases resulting in cease and desist orders under civil law. In merger cases penalties imposed result in orders of dissolution unless wilful violation is

involved. If it weren't for the long costly delays of court trials, orders of dissolution would leave the offenders in no worse position than they were prior to the merger. This seems like small punishment, but with the thin line of demarcation between "acceptable" and "non-acceptable" mergers, and because many cases are brought as test cases, a greater penalty might be too harsh.

While FTC cannot bar a merger in advance, the Department of Justice can so order it by an injunction. Notwithstanding this lack of authority by the Commission, if its investigations of a proposed merger indicates that it would be considered a violation, the firms in question would undoubtedly proceed in a manner as though an order had been issued.

The Department of Justice does not use the procedures followed by the Commission. Cases investigated by the Department are handled through the courts in legal proceedings.

The Early Law

As was pointed out in the "History of Mergers," the 1880's saw a rapid growth in the trust as a form of business control. That such giants as the Standard Oil Company under John D. Rockefeller needed to be checked was almost unquestioned.

The first formal action against such mergers must be credited to the states that had passed antitrust laws prior to 1890.[3] However, the Congress was not far behind and it was in 1890 that the Sherman Act was enacted. This act has most

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[3]Maine, Michigan, Kentucky, Tennessee, and Texas.

commonly been termed the Sherman Antitrust Act. The purpose was to enforce competition as the means of controlling industry. The three main provisions that we are particularly interested in are stated as follows:

> Section 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of commerce among the several states, or with foreign nations, is hereby declared to be illegal . . .
> Section 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor . . .
> Section 3. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nation, is declared illegal.[4]

There has been considerable discussion through the years as to the exact intent of the Congress in passing the Sherman Act. Some have said that it was the intention to prohibit all combinations that monopolized any part of trade. Sherman, however, said:

> It aims only at unlawful combinations . . . This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer.[5]

The first test case to come under the new Act was that of the American Sugar Refining Company. Through a long process of intricate share transfers, certificate transfers and purchases,

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[4]U.S. Code, Title 15, C.1.

[5]Bills and Debates on Trusts, 21 Congressional Record 2456-7

by 1892 the firm had managed to obtain control of 98 percent of the refining industry.

As a test case it turned out poorly for the Department of Justice. The Supreme Court decision nullified the Sherman Act by holding that the combination was a monopoly in manufacturing but not in interstate commerce. Because the refining was done within a state, the case was held to be one involving "primarily" only production or manufacturing, although the sugar was sold and shipped interstate. As it did not therefore involve "trade," it was deemed beyond the scope of Congress's power to regulate, and outside the bounds of the Sherman Act.[6] It was not until 1948 in the Mandeville Island Farms v. American Crystal Sugar Co. case that the doctrine of the court was reversed,[7] although it was evident as early as 1904 that future decisions of the court would not adhere to the strict interpretation given in the Knight case.

Industry was now encouraged to form combinations, well knowing that they had the backing of the Supreme Court.

In addition, the federal administration also believed that their power to act under the law had been stripped. Owens says, "In December of 1895 the Attorney General declared that combinations and monopolies could not be reached under the Sherman Act merely because they were combinations and monopolies, nor because they engaged in interstate commerce as one of the

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[6]United States v. E. C. Knight Company, 156 U.S. 1.

[7]Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948).

incidents of their business."[8]

The Department of Justice had more fortune in the next case before the courts involving combinations. In the Addyston Pipe Pool case it was determined that the combination was formed for the purpose of dividing markets and sharing the benefits of higher prices and it was ordered dissolved.[9]

Again the government was successful, this time in the dissolution of the Northern Securities Company. This holding company, organized in 1901, gained control of the entire railway transportation system in the northwest. The court held that "the mere existence of such a combination and the powers acquired by the holding company as its trustee constitute a menace to and a restraint upon the freedom of commerce."[10] This decision went a long way toward offsetting the previous effect of the Knight decision.

The case of real importance to the sponsors of the Sherman Act came in May of 1911, when the Standard Oil Company was ordered dissolved.[11] Although this victory meant much to the proponents of competitive enterprise, the case also meant just as much to those desiring expansion through merger. The ruling of the court added to the law by injecting the "rule of reason." While the Sherman Act outlawed <u>all</u> restraints of trade the interpretation of the Court outlawed only those that were "unreasonable."

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[8]Owens, <u>op.cit.</u>, p. 465.

[9]Addyston Pipe and Steel Company v. United States, 175 U.S. 211 (1899)

[10]193 U.S. 197.

[11]Standard Oil Co. v. United States, 221 U.S. 1 (1911).

The "rule of reason" became the doctrine of the courts and in some cases even went so far as to accept the idea that, while a combination was not legal, the effects of dissolution would be of greater consequence to the public interest.[12] The difficulty with such an application of law is that there is no longer a law. What remains is a principle which must be administered with judgment based on economics and public policy.

As the Sherman Act was designed to outlaw the trusts there were no direct provisions dealing with the new menace to industrial concentration, the holding companies. In addition, it offered nothing in the form of preventive maintenance for mergers. Thus in 1909, attempts were made to obtain amendments to the Act.[13] These attempts were designed primarily to make the Sherman Act more specific. It was contended that the act was broad enough to outlaw any combination, good or bad, and that it should, therefore, be more definite in its provisions.

It wasn't until 1914 that sponsors of an "antiholding company" act were successful and the Clayton Act was passed.[14] Section 7 is of principal concern to this study and it reads:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or

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[12]United States v. United States Steel Corporation, 251 U.S. 417 (March 1, 1920).

[13]Amending Anti-Trust Act, op.cit.

[14]U.S. Code, Title 15, Sec. 18.

community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisitions or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporation, or any of them, whose stock or other share capital is so acquired, or restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.

This section of the Act specifically prohibited the acquisition of stock, when such acquisition would substantially lessen competition between the acquiring and acquired concerns or if it was considered to be "in restraint of trade." Thus it is seen that the new law was silent on the acquisition of assets as distinguished from acquisition of capital stock. The mergers of that period were usually accomplished by stock purchases.

The deficiency in not specifically covering acquisitions of assets soon become apparent and mergers continued unabated. The error in not including the acquisition of assets in the law and the words "substantially lessen" and "tend to restrict" were more than the courts could contend with and little was to come of the Act.

The year 1914 was also notable for the Federal Trade Commission Act and the establishment of the Federal Trade Commission under the Act. The purpose of this body was to provide a means of extending control over practices in restraint of trade and to carry on investigations to provide the basis for further legislation.

The commission's control was intended both to prevent the growth of monopoly through "unfair methods of competition" and to check exploitative practices of monopoly directly. The commission was to hold hearings where illegal practices of either sort were suspected, either on its own

initiative or on complaint of injured competitors, and to hand down "cease and desist orders" where the practices actually were found to be illegal. It was hoped that the commission would both aid in checking monopoly practices and eliminate a large portion of the uncertainty arising out of the slowness of the courts in determining in particular cases what practices were"reasonable" and what "unreasonable."[15]

The Commission states their purpose as follows:

> The Federal Trade Commission was brought into being in a very real sense to assure, within the framework of our Constitution, the right of men to enter business without illegal restraints and restrictions, and by their perserverance, diligence and ability, to reap the returns which the private enterprise system holds out to those who are willing to take the incidental risk.[16]

Once again the first "test case" under a restraint of trade act was to backfire for technical reasons. On February 26, 1918 the FTC issued a "cease and desist" order against American Agricultural Chemical Company and the Brown Company. The charge was that the effect of American's acquiring the stock of Brown Company "may be to substantially lessen competition . . . or tend to create a monopoly in line of commerce." The case failed on the grounds "that there was no showing of proof that the acquired and acquiring companies were competitors as was required under the Act."[17] Once again the problem of writing statutes to include all possible situations was demonstrated.

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[15]Bowman and Bach, op.cit., p. 587.

[16]Grandey, op.cit., p. 1.

[17]Federal Trade Commission v. American Agricultural Chemical Company and the Brown Company, Docket 79 (October 8, 1918), 1 FTC 226.

The Department of Justice, The Federal Trade Commission and the Courts

The early reports of the FTC do not indicate much success in the ability to prevent mergers.[18] In addition, the government had two serious setbacks in the American Can Company[19] and the United States Steel Corporation cases. In both cases dissolution was desired but the courts refused to so order.[20] These cases established the common law that size alone was not improper. The Court ruling in the steel case held that the government's contention was one of condemnation of size and stated that "we must adhere to the law and the law does not make mere size or the existence of unexerted power an offense."

The first bright spot on the horizon came on February 26, 1923 when the Supreme Court denied a petition by the Aluminum Company of America and required the company to divest itself of the stock of the newly acquired Cleveland Metal Products Co., which the FTC had previously ordered.[21] This success was short-lived. The Aluminum Company claimed a debt of six hundred thousand dollars due it from the Cleveland Metal Products Co., and the FTC was unable to prevent the Aluminum Co. from acquiring, at execution sale, the properties involved in the original

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[18]Annual Report of the Federal Trade Commission, 1918, 1919, 1920, 1921, 1922. (Washington: Government Printing Office, June 30, Yearly).

[19]United States v. American Can Co., 230 Fed. 859, 903 (D.C., Md.)

[20]United States v. United States Steel Corporation, 251 U.S. 417 (March 1, 1920).

[21]Aluminum Company of America v. Federal Trade Commission, 284 Fed. 401 (1922).

suit. Thus, the Aluminum Company now owned 100 per cent of what the FTC ordered them to divest of when they only owned 66 2/3 per cent.[22]

As if this wasn't enough, the Commission lost three more cases in a row[23] and the Supreme Court's rulings were making mockery of the apparent intent of the Congress in passing the Acts. The only salvation to the pride of the Commission was that the Court continued split in its opinions. The majority opinion of the Court in the Thatcher case held that:

> The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held.[24]

The Court in making its ruling on the Swift case said:

> . . . the Commission is without authority to require one who has secured actual title and possession of physical property before proceedings were begun against it to dispose of the same, although secured through an unlawful purchase of the stock.[25]

The Commission viewpoint on this, put forward by its Chief Project Attorney, was:

> Under these . . . judicial interpretations of the statute, the legality or illegality of an acquisition was predicated not upon the effects that might flow from it, but upon the promptness with which the Commission could ascertain the facts regarding it and proceed against it.

The result of the decisions of the Supreme Court in the Thatcher and Swift cases were to rule that the Clayton Act did

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[22]Ibid, 362 Fed. 361 (1924).

[23]Swift & Company, 8F (2d) 598; Western Meat Company, 5FTC 417; Thatcher Mfg. Co., 5F (2d) 615. v. Federal Trade Commission.

[24]Thatcher Mfg. Co. v. Federal Trade Commission 272 U.S. 561 (1926).

[25]*Ibid*.

[26]Hill, *op.cit.*, p.2.

not forbid a corporation from eliminating another concern provided it acquired the assets and liquidated the competitior before the FTC could proceed against it!

Undaunted by its defeat in the cases already discussed, the FTC on May 27, 1927 again set about endeavoring to comply with its charter to issue "cease and desist orders," . . . "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition . . ." Thus came about the FTC v. V. Vivandou Inc., with the FTC charging an unlawful acquisition of the stock and other share capital of the Alfred H. Smith Company and The Parfumerie Melba Company, which shortly thereafter acquired the stock of the Melba Mfg. Co..[27]

The Second Circuit Court of Appeals in New York City, in reversing the FTC stated:

> The question on the appeal is whether the competition between these companies has been substantially lessened by reason of the stock acquisition and ownership referred to and whether the public has been injuriously affected.[28]

> We must consider the extent of the trade carried on by the three companies and compare it with the volume of business carried on by their competitors previous to the period of ownership of the stock, and endeavor to ascertain whether the public interest has been affected.[29]

Apparently oblivious of the courts, once again in 1934 a case of major importance to the Commission was brought to test.

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[27] Federal Trade Commission v. V. Vivandou, Inc., Docket 1464 FTC 306

[28] V. Vivandou, Inc. v. Federal Trade Commission 54 F (2d), 273 (1928)

[29] Ibid., 275

The complaint of the FTC v. Arrow-Hart and Hegeman Electrical Company, charged the concern, a holding company, with unlawfully acquiring the voting stock of two companies which were engaged in the manufacture of electric wiring devices.[30]

Although, on appeal, the FTC was upheld by the Appeals Court, with the previous history of legal decisions, it was not unexpected to hear Justice Roberts, delivering the majority opinion of the Supreme Court in this manner:

> We think the Commission lacked authority to issue any order against the petitioner. . . . The holding company could have ousted the commission's jurisdiction after complaint filed, by divesting itself of the shares, for that was all the Commission could order. And if it had so divested itself the transfer of the shares could immediately have brought about a corporate merger without violating the Clayton Act. . . ."[31]

It is pertinent to note that decrees have seldom restored competition. That laws should be made to prevent mergers rather than to unscramble them is only good sense.

The Temporary National Economic Committee in commenting on the situation at that time diagnosed it by saying: "The Supreme Court's decisions in mergers and consolidations have been few, erratic, and unpredictable."[32] The Committee went on to express the opinion that it was the intent of Congress to prohibit total ownership or domination of an industry. Otherwise the statutes, in their opinion, would have little meaning. While this Committee was not complimentary to the courts in the

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[30] Arrow-Hart & Hegeman Electric Company v. Federal Trade Commission 291 U.S. 587 1934.

[31] Ibid., 494

[32] Temporary National Economic Committee, Monograph No. 38, (Washington: Government Printing Office, 1941), p. 74

area of merger law, it did point out that they had little guidance from common law, and "the details are multitudinous, the facts perplexing in their intricacy." After making such apologies for the court they went on to say: ". . . monopoly means the degree of control the Supreme Court deems unlawful."[33] The Federal Trade Commission's views on this were:

> The effectiveness of the original Section 7 was drastically impaired by decisions of the Supreme Court. The Court failed to accord full recognition to the "incipiency doctrine" of competitive effects but applied generally the same test of substantial lessening of competition applicable in Sherman Act cases.[34]

The Present Law

In 1946 the Supreme Court dealing with the FTC was more liberal when Mr. Justice Douglas wrote:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.[35]

In 1948 the Supreme Court issued a sweeping affirmation of the Commission's findings and ruled that the basing point system was collusive price-fixing which was in violation of the Clayton Act. While at first it was believed that a victory for the Commission had been won, it actually was an inglorious defeat

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[33]*Ibid.*, p. 77.

[34]Hill, *op.cit.*

[35]Jacob Siegel Co. v. Federal Trade Commission 327 U.S. 608 (1946).

for their attempt to control mergers. The case dated from 1937 and was brought about by the system of charging freight in the cement industry, although it was a test case against a system used in many industries.

Between the period 1937 and the decision of the court in 1948 there was such a wave of mergers in the cement industry that by 1948 sixty per cent of the industry's capacity was in the hands of ten firms well distributed throughout the country and there was no further need for basing-point practices.[36] That the decision of the court forced mergers was proved in their own statements within that industry. Other industries that averaged freight costs from central shipping points for the purpose of being competitive, also were forced to look for similar opportunities for investment in areas other than those that they were producing in. That steel was costly to ship has already been discussed, and requirements for on the spot mills were no less a requirement of the steel industry than the cement industry as a result of the Supreme Court ruling on "basing-point" pricing.[37]

In the words of Justice Douglas, the most important antitrust case before the court in years involved the government's attempt to prohibit the acquisition of Columbia Steel by the United States Steel Corporation. The majority opinion of the court held that:

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[36]Federal Trade Commission, The Merger Movement: A Summary Report, op.cit., p. 2.

[37]Walker and Archerd, op.cit.

> It is not for courts to determine the course of the Nation's economic development. Economists may recommend, the legislative and executive branches may chart, legal courses by which business can seek to reduce costs and increase production so that a higher standard of living may be available to all. . . . No directive of Congress has appeared of a public policy that forbids, per se, an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nation-wide or county-wide. . . . If businesses are to be forbidden from entering into different stages of production, that order must come from Congress, not the courts.[38]

Justice Douglas in the dissenting opinion states:

> It is important because it reveals the way of growth of monopoly power--the precise phenomenon at which the Sherman Act was aimed. Here we have the pattern of the evolution of the great trusts. Little, independent units are gobbled up by bigger ones. At times any number of "sound business reasons" appear why the sale to or merger with the trust should be made.
>
> The most frequent reasons given for mergers are that they prevent waste and promote efficiency, reduce overhead, dilute sales and advertising costs, spread risks, etc. . . . But that these advantages are largely illusory has long been recognized. . . .

In the National Lead case the court refused a Department of Justice request to order sale of properties held by the company in the United States. The majority opinion of the court held:

> It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the anti-trust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.[39]

Since 1945, legislation had been pending in both the Senate and the House to amend Section 7 of the Clayton Act.

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[38]United States v. Columbia Steel Co., 334 U.S. 526 (1948)

[39]United States v. National Lead Company, 332 U.S. 319, 353 (1947).

The bill was introduced to the 79th (Democratic) and 80th (Republican) Congresses but never reached the floor for debate. It wasn't until 1950 that the amendment desired by the Commission became law.

The House Committee report on the Amendment was clear in its intention and said:

> But in the proposed bill, as has been pointed out above, the test of the effect on competition by the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. But there is a second, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate, as well as horizontal, which have the specified effects of substantially lessening competition...or tending to create a monopoly. If, for example, one or a number of raw-material producers purchases firms in a fabricating field (i.e., a "forward vertical" acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms. The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.[40]

The original law had the competitive test between acquiring and acquired concerns and did not spell out the desired meanings of "section of the country." The Senate report on the subject explains the intent of the Congress by saying:

> Although it is, of course, impossible to define rigidly what constitutes a 'section of the country' certain broad standards reflecting the general intent of Congress can be set forth to guide the Commission and the courts in their interpretation. What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless from an economic point of view to attempt to apply for all products

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[40]House of Representatives Committee Report No. 1191, 81st Congress, 1st Session, p.11

[41]Senate Report No. 1775, 81st Congress, 2nd Sess., p.5.

a uniform definition of section, whether such a definition were based upon miles, population, income, or other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.[41]

It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.[42]

The following is from the House Committee report:

The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a Nation-wide or industry-wide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country.[43]

There have been comments that the Clayton Act and the Amendment to the Clayton Act were not actually necessary, had it not been for the Courts, since the Sherman Act gave all the power necessary to prevent monopolies in restraint of trade.

Of this the House report stated:

The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of

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[41]Senate Report No. 1775, 81st Congress, 2nd Sess., p. 5.

[42]Senate Report No. 1775, op.cit.

[43]House of Representatives Committee Report, op.cit., p. 8.

competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair chance to compete.[44]

The Senate report contains the following language:

> The Committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have obtained such effects as would justify a Sherman Act proceeding.[45]

Speaking more specifically on the two tests of illegality provided in the Act,--that is substantial lessening of competition or tendency to create a monopoly, the House Committee said:

> These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.[46]

The Commission in reference to the amendment stated:

> To stem the destructive tide of the merger movement among industrial and commercial corporations and the consequent stiffling of competition, Congress amended Section 7 of the Clayton Act. The amending legislation, which was approved December 29, 1950, was enacted to plug loopholes in the original Act of 1914. Section 7 is now designed to prevent the destruction or suppression of competition through mergers of competing corporations or through the purchase by one corporation of a controlling interest in the capital stock or physical assets of its competitors. Formerly, the prohibitions of Section 7 were directed only against acquisition of capital stock; the amendment applies them to asset acquisition as well.[47]

"The Commission took action to provide the fullest measure of enforcement possible within its budgetary limitations.[48]

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[44]Ibid.

[45]Senate Report No. 1775, op.cit., p. 4.

[46]House of Representatives Committee Report, op.cit.

[47]Annual Report of the Federal Trade Commission, 1951, op.cit., p. 5.

[48]Ibid.

and on June 16, 1952, instituted its first formal proceedings under the amended section 7 of the Clayton Act.

Pillsbury Mills, Inc., was to make history in the realms of mergers by being cited for acquiring the assets of Ballard & Ballard Co., and the assets of Duff Bakery Mix Division of American Home Foods, both companies being in competition with Pillsbury Mills, Inc.. Pillsbury was already the second largest flour milling company in the United States with assets over $201,000,000. With the purchase of Ballard and Duff it was charged that they would control 45 percent of the baking mix market in the southeastern section of the United States.[49]

In addition to the Pillsbury case, during the fiscal year of 1953 (July 1952 to June 1953), the Commission issued 24 cease and desist orders under the Act; complaints were issued in 29 cases; 16 cases were closed; and cases in which investigations were made and completed totaled 373.[50] It can be seen, therefore, that the Commission was going to use the Amendment to the Act for all it was worth.

On December 28, 1953 the Federal Trade Commission announced its first decision under the new anti-merger statute in ruling on the Pillsbury case. "In an opinion by Chairman Edward F. Howrey, it vacated a hearing examiner's initial decision dismissing a complaint charging Pillsbury Mills, Inc., . . . with viola-

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[49] Ibid., 1952, p. 52.

[50] Ibid., 1953, p. 11.

tion of the anti-merger section of the Clayton Act."[51]

The original complaint had been vacated by the Hearing Examiner, on motion by Pillsbury, because the Trial Examiner had ruled that the Commission had only to prove a "reasonable probability" that competition was going to suffer. Pillsbury was not permitted to submit evidence or to extend its case.

Although holding that the Commission had a "prima facie" case against Pillsbury, Chairman Howrey in his December 28th announcement, speaking for the Commission said:

> . . . the Commission rejected the "substantiality" test as a measure of illegality under Section 7 of the Clayton Act. There must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences of corporate mergers and acquisitions.
>
> As we see it, amended Section 7 sought to reach the mergers embraced within its sphere in their incipiency and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of per se violations. Somewhere in between is section 7, which prohibits acts that 'may' happen in a particular market, that looks to 'a reasonable probability,' to 'substantial' economic consequences, to acts that 'tend' to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraints.
> While these are far from specific standards - specificity would in any event be inconsistent with the 'convenient vagueness' of antitrust prohibitions - they can, we believe, be applied on a case-by case basis. We think the present case is the type Congress had in mind - one that presents a set of facts which would be insufficient under the Sherman Act but nonetheless establishes, prima facie, a violation of Section 7 of the Clayton Act.[52]

Thus, the easy ground rules expected by many for the pressing of cases under the amendment to the Clayton Act was not

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[51]Federal Trade Commission, "Press Release, Remand 6000," (Washington: FTC, December 28, 1953).

[52]Ibid.

to be the case. Pillsbury was to have its day in Court! This day, if and when it came, was probably going to be a dark one for the Commission. Already the courts had ruled during the year against a more flagrant case than Pillsbury's. The Department of Justice believed it could easily win against duPont on proving that it controlled 75 percent of the cellulose wrapper industry. Statisticians and economists took over in court to prove that cellophane accounted for only 17.9 percent of flexible wrapping materials and in fact had ten major competitors in the field.[53] While this case didn't involve a merger it did set a precedent for the Court's thinking insofar as allowable control of an industry is concerned. Of this Harris says:

> This case was won on the old "rule of reason" and unless reversed by the Supreme Court spells doom for antitrust actions except in flagrant cases involving more than just concentration.[54]

In reference to the Pillsbury case it is pertinent to note that on the day the case was first dismissed, December 23, 1953, Pillsbury sold to Duff Baking Mix Corporation, a corporation formed just 12 days earlier, certain of the assets as well as the Duff name that had been obtained in the original complaint. Perhaps the law was working, even if in so devious a manner, but the FTC would have no part of it and immediately cited Pillsbury by saying:

> The sale by Pillsbury of a portion of the assets previously acquired by it from American and the purchase of such portion by Duff Corporation, as set forth in Paragraph Nine herein, does not constitute such a disposition of said assets

[53]United States v. E. I. duPont de Nemours, 118 F. Sup. 41 (1953).

[54]Harris, op.cit., p. 242.

as to render moot the violations of Section 7 of the Clayton Act, . . .[55]

The problems of the FTC, the Department of Justice and the law continued, and notwithstanding the Commission's predictions in their 1951 annual report of "the fullest measure of enforcement" few cases have come to the courts. Quoting from the 1951 FTC report it reads: "Primarily as a result of the strengthening of the Act, the number of investigations under Section 7 increased greatly during the last half of the fiscal year." It is noted in the report, however, that only 15 cases involving all facets of monopoly work were before the courts and only six cases had been decided in the previous fiscal year. None of these were under Section 7 of the Clayton Act. The 1952 Annual Report of the Commission lists 16 cases before the courts during the year none of which were under Section 7, and the 1953 Annual Report again lists 16 cases during the year with none under Section 7 of the Clayton Act.

This dearth of cases being brought to trial may be due to the ability of the FTC to get "consent decrees" from those on whom they issue "cease and desist" orders. It may be that the results of bringing cases to "legal law" instead of "administrative law" had been so unsuccessful that little further hope in this direction could be looked for as a way of stopping mergers, although the Commission was proceeding in two other cases besides Pillsbury's.[56]

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[55] Federal Trade Commission, Amended and Supplemental Complaint of Docket No. 6000.

[56] Federal Trade Commission v. Crown Zellerbach Company Docket 6180 and Lauria Brothers and Company et. al., Docket 6156.

In 1952 Thomas W. Christopher, in the Harvard Business Review, commented:

> The Federal Trade Commission was restricted in its interpretation of unfair methods of competition so severely that in the opinion of many the statute was practically useless in accomplishing its major purpose. Indeed the decisions of the various agencies as to remedy were generally subject to the whim of the Court.[57]

That the Government was discouraged would not seem to be the case. When the Bethlehem Steel Company-Youngstown Sheet & Tube Co. proposed merger was announced, the Attorney General voiced the Government's decision to bar the merger. It set off immediate reactions in the financial and business world. The opinion was that the merger would be made and once again an opportunity to test the law would be at hand. In announcing his decision the Attorney General said:

> . . . this marriage of America's second and sixth ranking steel companies would be "in violation of the anti-trust laws . . . its rejection is in keeping with the Eisenhower Administration's policy of enforcing "the necessary basic safeguards to free American enterprise".[58]

In reply to this, Eugene G. Grace issued a statement which made the implication that the merger was "on." He commented:

> The combination of the two companies is a constructive step and will not impair competition in the steel industry anywhere. . . . We believe that, unless Section 7 of the Clayton Act is going to be applied by the courts in such a way as to prevent all mergers, regardless of the extent of the competition between the companies or the over-all effect on the vigor of competition in the industry, the Bethlehem-

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[57]Thomas W. Cristopher, "Use and Misuse of Authority by Federal Trade Commission," Harvard Business Review, XXX (November-December, 1952), p. 49.

[58]The Wall Street Journal, Friday, October 1, 1954. "Brownell Formally Announces Decision to Bar A Merger of Bethlehem and Youngstown."

> Youngstown merger should be held to be entirely lawful. . . . We are actively exploring what further action may properly be taken to make the merger possible.[59]

Mr. J. L. Mouthe, President of Youngstown Sheet & Tube, declared:

> We believe the consolidation of these two companies would increase rather than lessen competition in the steel industry. . . . We are therefore reviewing the question of whether we will proceed to seek a determination of the matter by the courts.[60]

The indicated threat of the two concerns to bring the fight to the courts is not without good foundation and the Department of Justice is well aware of this. In 1948, by a vote of 5 to 4, the Supreme Court overruled the Department in the case of U.S. Steel's acquisition of Columbia Steel Corp.,[61] a merger previously discussed. Thus, we have the paradox of the number one firm in the industry growing by consolidation, plus a large tax write-off granted by the government for the building of the new Fairless plant in Bethlehem's back yard, while the same government refuses to let the number two firm grow in relative size.

Bethlehem's position could be stated by picturing the number two firm in an industry fighting throughout forty years of its life to compete with its big brother. All of a sudden they are told, "You no longer will be allowed to compete." Little wonder that the firms believe such a policy should be determined by the courts.

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[59] _Ibid._

[60] _Ibid._

[61] United States v. Columbia Steel Co., 334 U.S. 485 (1948).

A major consideration of Bethlehem and Youngstown might be the 5 to 4 decision of the Supreme Court in the U. S. Steel case. This is a small margin on which to base decisions required in expanding billion dollar organizations.

The Wall Street Journal suggests that this latest move by the Justice Department may be fanfare in an attempt to dramatize an effort to slow down the wave of corporate combinations. That such fanfare is going on is unquestioned as article after article on the subject appears concerning activities of the Commission, the Attorney General, and the Congress. The latest of these was entitled "Democrats to Attack Monopolies," and told of the expectations of the Anti-Monopoly Subcommittee of the Senate Judiciary Committee.[62] It is certain to become political before the year is out.

Commenting on this Harris says:

> Mr. Brownell's attitude is not likely to stop this merger movement, now nine years old. Even the amendment to the Clayton Act in 1950, passed to stop mergers, before they were made, proves futile.[63]

Another major setback came for the government on December 3, 1954 after five years of litigation. Once again the case did not directly involve a merger but it was of no less importance to firms already merged or those contemplating such action.

The case involved the attempt by the Department of Justice to dissolve the combination of interests between duPont,

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[62]The Evening Star, "Democrats to Attack Monopolies" Washington, D. C., November 30, 1954.

[63]Harris, op.cit., p. 102.

General Motors and United States Rubber. At the start of the trial in 1949 it was described by the Department as the "biggest antitrust case in the history of the United States," and "that it was aimed at breaking up the largest single concentration of economic power in the United States." The government's contention was that duPont bought major interests in the other companies to provide market outlets for its products, outlets that would have little or no competition. The ruling of the court was: "There has been no conspiracy to restrain or to monopolize trade, and no restriction or monopolization of the market."[64]

If the contention of the Department of Justice was true, that this was "the largest single concentration of economic power in the United States," and the court still refused to dissolve the combination of interests, then it appeared to offer considerable immunity to lesser combines.

Legal Law and Administrative Law

The discussions throughout this chapter have concerned the law, as determined by the courts. All has not been as dismal for the Commission or the Department of Justice, as pictured. To say that they have been unsuccessful with legal law would be an understatement, but to say that the commission has been unsuccessful with administrative law would not be factual.

In addition to the successes the Commission has enjoyed

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[64]United States v. E. I. duPont de Nemours & Co., et.al., U.S. District Court, Northern Illinois, 49c-1071 Civil.

in administrative law, it has also had signal success in dealing with other sections of the Clayton Act, as well as contributing to other economic work such as industry cooperation, defense mobilization planning and economic studies and procedures worked out for the benefit of the community as a whole.

The subject of administrative law will be taken up in the chapter "The Controversy" under the section dealing with the FTC. Whether a person considers law made by administrative agencies right or not, it is a part of our modern complex government, and unquestionably is here to stay. The Congress passes laws and in addition to these laws, creates agencies such as the Federal Trade Commission to carry out that law. That mistakes are made, or than an agency might become over zealous in the discharge of its duties, is a part of the system. Only history and the courts will determine the results, even tho in the process both seem difficult to understand.

Meanwhile, however, the FTC has been successful in many of its "cease and desist" orders dealing with Section 7 of the Clayton Act. Firms have "consented" to decrees without benefit of legal interpretation. In view of the lack of "common law" being well established in the field such consent may not be all the success that it indicates. The proponents of the FTC might quickly say that if a firm consents to an order by the commission that it would "prove" the firm's guilt. The detractors might just as quickly say that the cost of fighting a suit all the way to the Supreme Court and the resulting bad publicity, makes compliance easier. American business has clearly indicated in this study that decisions of the Court, continually made by split opinions, have not been conducive to the desire to risk

millions of dollars on investments that may be ordered to be "sold out" many years later on final court orders. If the laws were clear in defining "substantially" or "tend to," or if precedents had been firmly established, perhaps there would be fewer "consent" decisions; conversely, perhaps, there would also be fewer "cease and desist" orders.

Summary

As we have determined that "The History of Mergers" is far from complete, so also must we determine that "The Law of Mergers" is just as far from completion. It has been sixty-four years since the passage of the Sherman Act. In the development of the common law, this is a relatively short period. The impression is given, however, that all is not well in the attempts of government to make and use appropriate rules in which business can continue to prosper as well as contribute to the economy in the best possible manner for the social welfare of the community as a whole.

Fortune's review of J. K. Galbraith's, "American Capitalism," quoted the author in a very optomistic statement concerning this law of mergers. Galbraith said:

> Taking everything together, one of the most important reasons why the U.S. economy is competitive is the "contradictory," "impotent," and yet on the whole profoundly effective body of antitrust laws.[65]

The position of the Federal Trade Commission is well stated by its chief attorney when he says:

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[65] J. K. Galbraith, American Capitalism as cited in Fortune, June 1952, p. 194.

A few words should be said about the problem of proof in antitrust cases. Competition is a complex and constantly changing phenomenon. It has never been sharply defined. Injury to competition, as distinguished from injury to a competitor, is seldom capable of proof by direct testimony and may therefore be inferred from all the surrounding circumstances. An antitrust charge may . . . be proved by circumstantial evidence, and the circumstances may include actions affecting any of the broad issues of fact posed in the complaint.

Many times the law is violated solely because the law is not known. We are confident that if the members of an industry participate in the making of rules which, for the most part, restate and clarify the law, they will better know the law and, knowing it, will, in general, be anxious to follow it. Our objective is not to make trouble for the members of an industry, but to assist the members of an industry, in every way possible, to avoid trouble.[66]

66Hill, op. cit.

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